

Ngamta (Migration) [2024] AATA 1215 (15 May 2024)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Kanokpich Ngamta
REPRESENTATIVE:	Mr Gareth John Lewis (MARN: 0319248)
CASE NUMBER:	1932120
HOME AFFAIRS REFERENCE(S):	BCC2018/605563
MEMBER:	Kira Raif
DATE:	15 May 2024
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2)(a) of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations • reg 2.03A

Statement made on 15 May 2024 at 1:33pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – financial, household and social aspects of relationship and nature of commitment – length and registration of relationship – different incomes and capacity to contribute – joint registration of business – consistent and credible oral evidence, additional documentation and supporting statements – decision under review remitted

LEGISLATION

*Migration Act 1958 (Cth), ss 5CB(2), 65
Migration Regulations 1994 (Cth), rr 1.09A(3), 2.03A(5), Schedule 2, cls 820.211(2)(a), 820.221*

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

Application for review

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant is a national of Thailand, born in May 1973. She applied for the visa on 5 February 2018 on the basis of her relationship with her sponsor. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 820.211 and cl. 820.221 because the delegate was not satisfied the applicant was a de facto partner of the sponsor. The applicant seeks review of the delegate's decision.
3. The applicant appeared before the Tribunal on 27 March 2024 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Thai and English languages. The applicant was represented in relation to the review. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Relevant law

4. At the time the application was made, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).
5. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.
6. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s 5CB(2).
7. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.09A(3). Each of the specific matters contained in reg 1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties in a de facto relationship?

8. The applicant and sponsor claim to have met in 2014 at a massage shop. The applicant was previously in another de facto relationship which ended around 2016 and was de-registered in June 2018. (The applicant states that the first partner cancelled her visa without telling her and she did not know what to do.) The applicant claims that from 2016 she and the sponsor started the company together and from February 2017 they started their de facto relationship which is now widely recognised.

9. The Tribunal has had regard to the evidence that was submitted with the primary application and there is a considerable amount of additional documentary evidence before the Tribunal. The Tribunal has also had the benefit of the parties' oral evidence and found them to be credible, consistent and truthful. The Tribunal accepts the claims made in various written and oral submissions.
10. The Tribunal has had regard to the financial aspects of the relationship. There is evidence that the couple operate a joint account which they claim is used primarily for travel expenses. Both the applicant and the sponsor operate their own, separate personal accounts where their wages are deposited. They claim that the sponsor is responsible for meeting the daily expenses and has contributed towards the business that is now managed by the applicant.
11. The Tribunal accepts that the applicant and sponsor pool their resources and that they do it on an unequal basis due to their different incomes and capacity to contribute.
12. There is also evidence before the Tribunal that they jointly registered a business and both had contributed to the operating expenses (although their evidence about the sponsor's contribution was not consistent). The applicant is primarily involved in the day to day operation of the business but the sponsor also contributes with some tasks. The Tribunal accepts that the applicant and sponsor are willing to establish joint liabilities.
13. The couple gave consistent evidence about the nature of the household and their domestic responsibilities. The Tribunal accepts that they have been living together from 2017, for a period of approximately seven years. Until 2-3 years ago the sponsor's children also lived in the same household and the Tribunal accepts that they support the relationship and accept it. The Tribunal accepts that the applicant and sponsor share the housework.
14. There is ample evidence before the Tribunal to indicate that the relationship is widely recognised. There are written statements from the sponsor's family and friends, multiple photographs depicting the couple engaging in social activities with friends and relatives and attending family functions. They spoke about joint travel, including the sponsor making several trips to Thailand to visit the applicant's family. The Tribunal is satisfied the applicant and sponsor represent themselves to other people as being in a de facto relationship with each other. The Tribunal accepts friends and acquaintances believe the relationship to be a genuine one. The Tribunal accepts that the couple plan and undertake joint social activities.
15. The relationship has been in existence for approximately seven years. The Tribunal accepts that the couple provide companionship and emotional support to each other and they spoke about their common interests and activities they enjoy together and with friends.
16. Having regard to all the circumstances, the Tribunal is satisfied that the applicant and sponsor have a mutual commitment to shared life to the exclusion of others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together. There is nothing to suggest they are related by family. On the basis of the above the Tribunal is satisfied that the requirements of s 5CB(2) are met at the time the visa application was made and the time of this decision. Therefore the applicant meets cl 820.211(2)(a). The Tribunal is satisfied the applicant and sponsor continue to be in a de facto relationship at the time of this decision. The Tribunal finds that the requirements of cl. 820.221 are met.

Are the additional criteria for a de facto relationship met?

17. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in reg 2.03A. Both members of the couple must be at least 18 years old:

reg 2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.

18. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: reg 2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
19. The applicant's evidence is that she knows the sponsor since 2014 as he was a customer but they started a de facto relationship around February 2017. The Tribunal is not satisfied the relationship had been in existence of 12 months before the application was made.
20. On 15 May 2024 the applicant provided to the Tribunal The evidence that the relationship is registered under the *Births Deaths and Marriages Registration Act 1995* as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: reg 2.03A(5). Accordingly, the 12 month requirement does not apply.

Conclusion

21. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

22. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl 820.211(2)(a) of Schedule 2 to the Regulations
 - cl 820.221 of Schedule 2 to the Regulations
 - reg 2.03A

Kira Raif
Senior Member